

The Rucker Law Firm, L.L.C.
128 Millport Circle, Suite 200
Greenville, SC 29607

t- 864-271-9925

f- 864-271-9554

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NOV 20 2017

S.C. SUPREME COURT

November 17, 2017

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Christopher Hampton 2014-CP-42-1197

Please find enclosed for filing:

- Notice of Appeal
- Proof of Service of the Notice of Appeal
- Copy of the final Order being appealed

If you have questions or concerns, please do not hesitate to contact me.

Sincerely,

s/ Brandt Rucker

Brandt Rucker, Esq.

CC:

Valerie Giovanoli, Esq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Circuit Court

S.C. SUPREME COURT

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2014-CP-42-1197

State of South Carolina,

Respondent,

v.

Christopher Hampton,
#00314697,

Appellant.

Notice of Appeal

Christopher Hampton appeals the order of the Honorable Larry B. Hyman, Jr., dated October 16, 2017. Appellant received written notice of entry of this order on October 24, 2017.

November 8, 2017

Sincerely,



Brandt Rucker
128 Millport Circle, Suite 200
Greenville, South Carolina 29607
(864) 271-9925
Attorney for Appellant

cc:
Other Counsel of Record:

Valerie Garcia Giovanoli, Esq.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

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NOV 20 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
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Case No. 2014-CP-42-1197

State of South Carolina,

Respondent,

v.

Christopher Hampton,
#00314697,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on November 9, 2017, to Valerie Garcia Giovanoli, Esq., S.C. Attorney General's Office, P.O. Box 11549, Columbia, SC 29211.



Brandt Rucker
128 Millport Circle, Suite 200
Greenville, South Carolina 29607
(864) 271-9925
Attorney for Appellant
November 9, 2017

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Christopher L. Hampton, #314697

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

) 2014-CP-42-1197

) **ORDER GRANTING**
) **RELIEF**

CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY

This matter came before the Court by way of an Application for Post-Conviction Relief (PCR). The Applicant is represented by Brandt Rucker, Esq. The State of South Carolina was represented by Assistant Attorney General Alicia Olive. The Applicant is currently serving a life sentence in the South Carolina Department of Corrections pursuant to a guilty plea to one count of murder.

A hearing was held on November 9, 2015. The Applicant appeared and testified. The applicant's former attorney for his previous PCR, Jeffrey McGurk, Esq., was not present. The applicant's plea attorney, Michael Bartosh, died two days after the guilty plea and as a result was not present for this hearing. The Court reviewed the entire case file, including the plea transcript, and heard the testimony of all parties and witnesses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted on one count of murder (2005-GS-42-3629) at the August 29,

2005 term of the Spartanburg County Grand Jury. The Applicant was represented by Michael Bartosh throughout the case and at his guilty plea hearing which was held on April 3, 2006. Mr. Bartosh passed away two days after the guilty plea, and the Applicant was never informed about his right to appeal the guilty plea.

The Applicant subsequently filed an application for post-conviction relief (PCR) September 15, 2006. The State filed a Return. An evidentiary hearing was convened on September 17, 2007, at the Spartanburg County Courthouse, at which the Applicant and represented by W. Jeffrey McGurk, Esquire. In the first PCR Application, The Applicant raised the following issues in his:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to challenge the voluntariness of his statement to police,
 - b. Counsel failed to move for a change in venue,
 - c. Counsel failed to explain to Applicant that if he proceeded to trial, there might be the option of being found guilty of a lesser-included offense,
 - d. Counsel failed to present mitigating circumstances to the sentencing judge,
 - e. Counsel failed to review discovery materials with Applicant, including the videotape of his confession, written statement, Detective Steadman's report, or the mental health evaluation,
 - f. Counsel failed to adequately meet with Applicant prior to the guilty plea,
 - g. Counsel failed to pursue a theory of self-defense,
 - h. Counsel failed to object when Solicitor Gowdy read a letter from the victim's family asking for the maximum sentence.

At the hearing, Applicant also raised the issue of his right to a belated review of direct appeal issues. The State consented to allow the Applicant to pursue the belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

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The Honorable Roger L. Couch granted Applicant the right to have the belated review of direct appeal issues, but denied and dismissed the remainder of Applicant's application by written Order on November 2, 2007. The Applicant did not appeal the denial of his PCR application.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of PCR Counsel, in that;
 - a. Counsel failed to appeal the denial of Applicant's prior PCR application as instructed to by Applicant,
 - b. Counsel failed to appeal the denial of Applicant's prior PCR in order to secure the belated review of direct appeal issues as granted by the PCR judge,
 - c. Counsel failed to "push the issue of a continuance" to have time to re-subpoena Applicant's interrogator who was not present at the hearing,
 - d. Counsel failed to put into evidence the two pre-interrogation waiver forms to support claim of involuntary confession,
 - e. Counsel failed to raise the issue of trial counsel failing to investigate the voice and video evidence used by police in the hours leading up to the Applicant's confession, f. Counsel failed to investigate the voice and video evidence to support the claim of an involuntary confession,
 - g. Counsel failed to effectively cross-examine Investigator Steadman as to the events leading up to the involuntary confession, which would have impeached Steadman's testimony and credibility,
 - h. Counsel failed to subpoena James Cheek, Esquire, to testify at the PCR hearing as to trial counsel's pressure on Applicant to plead guilty,
 - i. Counsel failed to explain to the PCR judge that the plea could not be voluntary when Applicant did not know any of the State's evidence,
 - j. Counsel failed to address trial counsel's failure to move to have the plea judge disqualified when the judge wiped away tears during the victim impact testimony,

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- k. Counsel failed to meet with Applicant to discuss direct appeal issues,
- l. Counsel failed to respond to letters over the years from Applicant and the Supreme Court's letter concerning Applicant's belated pro se notice of appeal,
- m. Counsel failed to raise and preserve the Brady issues, which indicate the police and/or prosecution have withheld the confession and indictment impeaching evidence.

This court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has had the opportunity to weigh the testimony of the witnesses, review the transcript, and review and weigh the evidence in this case pursuant to S.C. Code Ann. § 17-27-80 (2003).

The Applicant alleges he received ineffective assistance of counsel. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052). Additionally, in a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the

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evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

The Applicant's issues are based on the failure of his plea level attorney and PCR attorney to appeal. In South Carolina, the decision to grant a belated appeal from a guilty plea is found in Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). The Supreme Court held "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). "The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal. One extraordinary circumstances which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal. *Id.*

As to the issue regarding belated appeals from an Order of Dismissal of the PCR Application, the South Carolina Supreme Court is clear regarding who is entitled to a belated appeal and the procedure to be followed. All applicants are entitled to a full and fair opportunity to present claims in one PCR application. Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than "one bite at the apple as it were." Matthews v. Evatt, 105 F.3d 907, 916 (1997) (quoting Gamble v. State, 298 S.C. 176, 379 S.E.2d 118, 119 (1989)). A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987); see S.C.Code Ann. § 17-27-90 (1976 & Supp.1997). In order to be entitled to a successive PCR application, the applicant must

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establish that the grounds raised in the subsequent application could not have been raised in the previous application. Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999).

Additionally, successive PCR applications are permitted in rare procedural circumstances. See, e.g., Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982) (allowing a successive PCR application where the applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing); Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987) (permitting a successive application where the applicant did not have PCR counsel that differed from his trial counsel).

This Court has allowed successive PCR applications where the applicant has been denied complete access to the appellate process. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or "one bite at the apple." Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991). This "bite" includes an applicant's right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal. See Aice, 305 S.C. at 448, 409 S.E.2d at 392.

An Austin appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when an attorney fails to seek timely review. See Aice, 305 S.C. at 448, 409 S.E.2d at 392; Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997) (permitting an Austin appeal where original PCR counsel failed to appeal from the first denial of PCR). In Austin, the defendant never received a full procedural "bite at the apple" because he was prevented from seeking any review of the denial of his PCR application. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds

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either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. See King, 308 S.C. at 348, 417 S.E.2d at 868. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and this Court will review whether the petitioner was prejudiced by the failure to obtain appellate review. Id.; see King, 308 S.C. at 349, 417 S.E.2d at 868 (outlining the procedure used to seek review pursuant to Austin v. State); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992).

The Applicant presented evidence through his testimony. Applicant testified that he was seeking appellate review of his original guilty plea, and was seeking appellate review of his denial of PCR. Applicant testified that because of the death of his plea counsel, Michael Bartosh, he was never informed of his right to appeal, the deadline to appeal, and the time limits for such appeal. The Applicant testified that Mr. Bartosh and he were supposed to meet in the time after his guilty plea, but because Mr. Bartosh died, he was not able to go over his options with him. He testified that he would have appealed his guilty plea had he been given the opportunity. The review of the plea transcript indicates that the Applicant was not informed of his right to appeal the guilty plea on the record, that there is an exceptional circumstance in this case in that Mr. Bartosh passed away before meeting with the Applicant regarding a potential appeal and the State produced no evidence that the Applicant had knowledge of his rights regarding an appeal or wished to waive his appeal rights. There is simply no contradictory evidence to the Applicants assertions.

Applicant also claims that he was not given an opportunity to appeal the Order of

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Dismissal of his PCR claim. The Applicant testified that his PCR attorney, Mr. McGurck, failed to appeal the Order of Dismissal of the Applicant's application despite the Applicant repeatedly requesting him to do so. This testimony is uncontradicted as Mr. McGurck did not appear at this hearing, and the State offered no evidence against the Applicant. It appears from the record and the testimony, that the Applicant is entitled to an appeal pursuant to Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995) regarding his guilty plea.

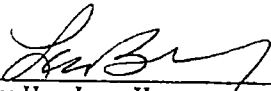
CONCLUSION

Based on the foregoing, the Court finds and concludes the applicant has met his burden, and that this case must be remanded for a new trial.

IT IS THEREFORE ORDERED:

1. The applicant is entitled to a belated appeal from his guilty plea and a belated appeal from the Order of Dismissal of his PCR application.

AND IT IS SO ORDERED this 4 day of ~~Sep~~ October, ~~2016~~ 2017.



The Hon. Larry Hyman
Presiding Judge, Seventh Judicial Circuit

Conway
Spartanburg, SC

Date: 10-4-17

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Christopher Hampton)
 Plaintiff)

v.)

State of South Carolina)
 Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2006-CP-42-3049

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: W. Jeffrey McGurk, Bar No. Address: P.O. Box 3213 Spartanburg, South Carolina 29304 phone: fax: e-mail: other:	Defendant's Attorney: S. Prentiss Counts, Bar No. 74070 Address: P.O. Box 11549 Columbia, SC 29211-11549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
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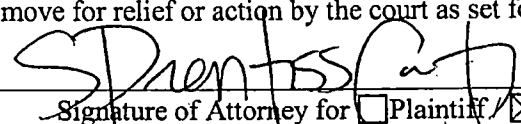
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed Order.


 Signature of Attorney for Plaintiff / Defendant

October 19, 2007
 Date submitted

SECTION III: Motion Fee

PAID - AMOUNT:
 EXEMPT:

<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support	FILED CLERK OF COURT SPARTANBURG COUNTY 2007 NOV -5 PM 4: 01 MARC KITCHENS
(check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect	
<input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party	
<input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief	
<input type="checkbox"/> Motion for Stay in Bankruptcy	
<input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)	
<input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions	

Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other: _____

JUDGE: _____
 CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed: _____

Collected by: _____

MOTION FEE COLLECTED: _____
 CONTESTED - AMOUNT DUE: _____

AK# 300077

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2006-CP-42-3049

Christopher Hampton, # 314697,

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

I. PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 15, 2006. An evidentiary hearing into the matter was convened on September 17, 2007, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by W. Jeffrey McGurk, Esquire. The Respondent was represented by S. Prentiss Counts of the South Carolina Attorney General's Office. This Court had before it the application, the respondent's return, the guilty plea transcript, the records of the Spartanburg County Clerk of Court and the Applicant's records from the South Carolina Department of Corrections.

At the hearing, the Applicant moved for a continuance to review discovery, specifically report produced by Detective Stedman. The Court denied this motion but allowed the Applicant time to review this document.

At the hearing, the State consented to allow the Applicant to pursue a direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was

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indicted at the August 2005 term of the Spartanburg County Grand Jury for Murder (05-GS-42-3629) and Criminal Sexual Conduct with a Minor, Second Degree (05-GS-42-3630). The Applicant was represented by Michael Bartosh, Esquire. On April 3, 2006, the Applicant pled guilty to Murder. CSC with Minor, 2nd was *not pressed*. Applicant was sentenced by the Honorable John C. Few to confinement for Life.

A Motion to File Notice of Appeal Out of Time was filed on the Applicant's behalf on May 10, 2006 stating that trial counsel had passed away two (2) days after trial and had not filed Notice of Appeal. The Court of Appeals denied this motion by Order of Dismissal dated May 17, 2006. The remittitur was issued June 1, 2006.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Applicant's Testimony

At the PCR evidentiary hearing the Applicant testified that counsel was ineffective for failing to move to suppress his statement. He stated that his statement was involuntarily given. The Applicant described the circumstances around giving his confession in great detail.

The Applicant was picked up by Detective Stedman and Detective Lamb from the Edgefield Federal Penitentiary. Shortly after departure, the Detectives pulled over to the side of the road and served the Criminal Sexual Conduct warrant on him. They did not serve the Murder warrant at that time. At that time, he refused to sign the pre-interrogation waiver and asked for an attorney. They continued to their destination and the Detectives informed him that a press conference had been set for that afternoon. The Applicant stated that the Detectives told him there would be "beatings" and that he was in "their" custody now. They stopped at the Clinton Detention Facility to allow the Applicant to use the restroom. Once arriving in Spartanburg, the Detectives took the Applicant to

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the narcotics building. There he ate a cheeseburger. He was not left alone and asked for an attorney. The Detectives continued talking to the Applicant and showed various evidence from the crime scene. The Applicant finally involuntarily gave in to the pressure and said, "let's go." The Applicant proceeded to take the Detectives to where he had buried the body. Later that night he signed a statement indicating he was guilty of the murder. He stated that he did not mention that the victim had a box-cutter in his statement because the Detectives told him to make up a story. They stated that Solicitor Gowdy had told them that the Applicant had the paintbrush and could to paint it however he liked.

The Applicant testified that counsel was ineffective for failing to move for a change in venue. He stated that the entire case happened in Spartanburg County and that he was prejudiced by having to proceed forward in that county.

The Applicant testified that counsel was ineffective for failing to explain to him that if he proceeded to trial, he had the opportunity to be found guilty of a lesser included offense. He stated that counsel did not define malice for him and he was unaware that he had any other choice at trial besides guilty or murder or not guilty of murder.

The Applicant testified that counsel was ineffective for failing to present further mitigating circumstances to the sentencing judge. He should have informed the Judge that he had a three (3) year old daughter, that he had been working, and that he had a non-violent criminal history.

The Applicant testified that counsel was ineffective for failing to show him discovery from the State. He was never shown the videotape of his confession, his written statement, Detective Stedman's report, or his mental health evaluation.

The Applicant testified that counsel was ineffective for failing to adequately meet with the Applicant prior to his guilty plea. He stated that counsel only met with him twice for a little over an

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hour before he pled guilty.

The Applicant testified that counsel was ineffective for failing pursue a theory of self-defense. He stated that he sent counsel letters stating that the victim had a box-cutter and he only hit her in the head with a hot iron out of self defense. The reason he hid the body was because he was scared. The reason he lied to law enforcement and did not tell them she had a box-cutter was because he was scared. The reason he did not tell the *Herald Journal* about the box-cutter in their interview was because he was scared. The reason he returned after he had been released from jail on unrelated charges and dug up the body and decapitated her to dispose of her head in a dumpster was because he was scared.

The Applicant testified that counsel was ineffective for failing to object as Solicitor Gowdy read a letter from a family member of the victim asking for the maximum sentence. He stated that the State was not to recommend the maximum sentence at the plea. By reading Rebecca's statement, the Solicitor was allowed to indirectly ask the Court for the maximum sentence.

The Applicant testified that the reason he lied to the plea judge was because he just wanted to get it over with.

Detective Stedman's Testimony

Detective Jay Stedman testified regarding the details surrounding the Applicant's confession. He and Detective Lamb picked the Applicant up from Edgefield Federal Penitentiary on August 15, 2005 in an unmarked SUV. They took the unmarked SUV so they would have more room. Less than a mile from the penitentiary, they pulled over and served the Criminal Sexual Conduct warrant on the Applicant. At that time, the Applicant refused to sign the pre-interrogation waiver. Detective Stedman recalls casual conversation for most of the ride back. The Applicant was never threatened or coerced. He never asked for an attorney. No one ever threatened him with beatings.

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The Detectives did discuss certain facts of the case among themselves on the drive and they probably mentioned the press conference to the Applicant.

The Detectives stopped in Clinton and arranged with the County Jail to allow the Applicant to use their restroom. When they arrived in Spartanburg, they took the Applicant to the Narcotics building because they assumed the press would already be at the station. They put him in an interrogation room and re-read his Miranda rights. They gave the Applicant a cheeseburger and cigarettes. The Detectives showed the Applicant pictures of evidence and discussed the different lies he had told law enforcement previously. They told the Applicant that the victim's blood had been found in his apartment. The Applicant got up and stated, "let's go." He took them to the body. Later he gave a full, video-taped confession to law enforcement after signing a pre-interrogation form.

The Detective testified that the Applicant was never threatened or coerced. He never asked for an attorney. He was never denied food or water or access to a restroom. The Applicant was read his Miranda rights multiple times. The Applicant voluntarily showed the Detectives where the body was buried. The Applicant voluntarily gave a statement to law enforcement.

III. APPLICABLE LAW

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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MARC KITCHENS

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Statements During a Guilty Plea

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

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Trial Judge Colloquy Cures Counsel Statements

Even where counsel fails to advise, or even misadvises, a defendant regarding a critical aspect of his charges the error is cured where the trial court during a guilty plea properly advises the defendant about the matter in question. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). See also Knox v. State, 340 S.C. 81, 86, 530 S.E.2d 887, 889 (2000), *overruled on other grounds by State v. Gentry*, 2005 WL 524813 (S.C.).

Venue

It is the defendant's burden to demonstrate actual juror prejudice as a result of pretrial publicity. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004).

Time Spent with Applicant

The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the testimony presented at the evidentiary hearing, observed witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

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Direct Appeal Issue

At the hearing, the Applicant alleged that he was denied effective assistance of counsel when trial counsel failed to inform him of his right to appeal his guilty plea. The State consented to allow the Applicant to file his belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

This Court agrees that the allegation that the Applicant was denied a direct appeal is meritorious. Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California.¹ White, Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).²

The Court affirmatively finds that the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that the Applicant is entitled to a belated review of his conviction(s). The Applicant's lack of a direct appeal can be remedied by a petition for belated review pursuant to White v. State.

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¹ 386 U.S. 738, 87 S.Ct. 1396 (1967).

² "Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, **the applicant must petition this Court for a White v. State review.**" [Emphasis added]. Davis, 288 S.C. at 291, n. 1, 342 S.E.2d at 60.

Other Allegations of Ineffective Assistance of Counsel

This Court finds the Applicant's testimony to be not credible on all issues. This Court finds Detective Stedman's testimony to be credible.

This Court finds that no credible evidence was presented to prove that the Applicant's statement was involuntarily given. This Court finds that the Applicant's statement was freely and voluntarily given. Nevertheless, this Court finds that the Court informed the Applicant that by pleading guilty, he would be giving up his right to challenge the voluntariness of the statement (Tt. Pg. 17, lines 20 - Pg. 28, line 10). He informed the plea judge that he had discussed this with counsel and wished to waive that right. This Court notes that the Applicant told the plea judge that he had no complaints regarding law enforcement (Tt. p. 8, lines 5-9). The Applicant failed to present a valid reason why he should be allowed to depart from the truth of his statements during his guilty plea. This Court finds the Applicant freely and voluntarily waived his right to challenge his statement and denies and dismisses this allegation.

This Court finds that the Applicant has failed to prove he was prejudiced by counsel's failure to file a motion to change venue. The Applicant bears the burden of proving that pre-trial publicity would affect the jurors impartiality. Here, the Applicant waived his right to a jury trial, thus giving up his right to question the impartiality of the potential jury pool (Tt. p. 7, lines 4 - 14). The Applicant failed to present a valid reason why he should be allowed to depart from the truth of his statements during his guilty plea. The Applicant provided no evidence whatsoever that he was prejudiced in any way because this motion was not made. This Court denies and dismisses this allegation.

This Court finds that counsel was not ineffective for failing to explain to the Applicant that he could ask for a lesser included offense at trial. This Court finds that the Applicant is not credible. Furthermore, this Court finds that the plea judge informed the Applicant that he was waiving his

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right to claim that he was guilty of a lesser included offense. (Tt p. 18, lines 14-18). The Applicant responded that he wanted to waive that right. The Applicant failed to present a valid reason why he should be allowed to depart from the truth of his statements during his guilty plea. This Court finds that the Applicant was informed of his right to pursue a lesser included offense and freely, intelligently, and voluntarily waived that right.

This Court finds that counsel was not ineffective for failing to define malice for the Applicant. This Court finds that the Applicant is not credible. This Court notes that counsel informed the plea judge that he discussed the elements the State would have to prove to find him guilty of murder (Tt. p. 3, line 22 - p. 4, line 2). This Court also notes that the plea judge asked the Applicant if he understood the theory of malice aforethought and he stated that he did. (Tt. p. 19, lines 18-20). The plea judge also asked if he had discussed malice aforethought with counsel and he answered that he had (Tt. p. 19, lines 21-22). The Applicant failed to present a valid reason why he should be allowed to depart from the truth of his statements during his guilty plea. This Court denies and dismisses this allegation.

This Court finds that counsel was not ineffective for failing to inform the plea judge of other mitigating circumstances during sentencing. This Court finds that counsel adequately presented mitigation to the plea judge. This included, but was not limited to, his age, his family background, his educational background, his work background, his ultimate cooperation with law enforcement and his remorse for what he did (Tt. p. 40, line 2 - p. 44, line 1). Furthermore, the Applicant has failed to prove that he was prejudiced in any way by the omission of his daughter and his non-violent criminal history. This Court finds the Applicant has failed to carry his burden and denies and dismisses this allegation.



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This Court finds that counsel was not ineffective for failing to share discovery with the Applicant. This Court finds that the Applicant was not credible. Furthermore, the Applicant has presented no evidence that he was prejudiced in anyway from failing to review videotape of his confession, his written statement, Detective Stedman's report, or his mental health evaluation. This Court notes that the Applicant was allowed to review his statement during the guilty plea proceedings (Tt. p. 16, lines 16-19). This Court finds the Applicant has failed to carry his burden of proof and denies and dismisses this allegation.

This Court finds that counsel was not ineffective for failing to meet with the Applicant for a sufficient amount of time before the guilty plea. This Court finds that the Applicant was not credible. This Court notes that the Applicant informed the Court that he had enough time to discuss his decision to plead guilty (Tt. p. 9, lines 24 - p. 10, lines 1). He also told the Court that he was completely satisfied with counsel, he had done everything he wanted him to do (Tt. p. 7, lines 21 - p. 8, line 1). The Applicant failed to present a valid reason why he should be allowed to depart from the truth of his statements during his guilty plea. Furthermore, the Applicant has failed point to any specific matters counsel failed to discover which would have caused him to proceed with a jury trial instead of pleading guilty, aside from his other allegations of ineffective assistance of counsel. This Court finds this allegation is wholly without merit and denies and dismisses

This Court finds that counsel was not ineffective for failing to pursue the theory of self defense at trial. This Court notes that the Applicant waived any defenses he had during his guilty plea (Tt. p. 18, lines 14 - 19). This Court finds that the Applicant was not credible. Furthermore, the Applicant failed indicate any elements of self-defense in his video-taped statement to police or his subsequent interview with the *Herald Journal*. During his guilty plea, the Applicant told the judge that his statement was accurate (Tt. p. 17, lines 13 - 17). He also agreed with the Solicitor's

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recitation of the facts (Tt. p. 15, line 11). The Applicant failed to present a valid reason why he should be allowed to depart from the truth of his statements during his guilty plea. The mere existence of letters written to counsel with an alternate version of events does not carry the burden to prove that counsel was ineffective for failing to pursue self-defense. This Court finds that the Applicant knowingly and intelligently waived his right to pursue self-defense and denies and dismisses this allegation.

This Court finds that counsel was not ineffective for failing to object as the Solicitor read a letter written by a family member of the victim. The record clearly indicates that the letter was not written by the Solicitor and did not convey his wishes. The plea judge would have easily understood this. The Court finds that this allegation is wholly without merit and denies and dismisses this allegation.

Furthermore, this Court finds that the Applicant's plea was freely and voluntarily given. He testified that his answers were his own, were truthful, and that no one had told him how to answer the questions (Tt. p. 11, lines 12 - 24). The Applicant failed to present a valid reason why he should be allowed to depart from the truth of his statements during his guilty plea. This Court finds that the Applicant has failed to prove prejudice from any alleged ineffective assistance of counsel received. The Applicant failed to show, with reasonable probability, that but for counsel's alleged ineffectiveness, he would not have pled guilty. This Court finds that the Applicant failed to carry his burden to show that trial counsel's representation fell below the standard of professional reasonableness for a criminal defense attorney in this regard. Strickland v. Washington; Cherry v. State. The Court finds that the Applicant cannot satisfy either requirement of the Strickland test

As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this order, the Court finds that the



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Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that the Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are denied and dismissed with prejudice.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that all allegations in this application for post conviction relief, with the exception of his belated appeal, must be denied and dismissed with prejudice. All other allegations or claims that were raised or could have been raised in this application are hereby dismissed with prejudice.

This Court further concludes that the Applicant is entitled to a belated direct appeal of his criminal conviction. White v. State; Davis v. State.


This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, the applicant must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED:

1. This application for post conviction relief is denied and dismissed with prejudice.
2. Within thirty days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicants' convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 227(g) for the appropriate procedure for securing belated appellate review
3. The Applicant is remanded to the custody of the South Carolina Department of Corrections to serve the remainder of his sentence.

AND IT IS SO ORDERED this 2nd day of November, 2007.



ROGER L. COUCH
Presiding Judge
Seventh Judicial Circuit

, South Carolina.

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